HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27E – Plaintiffs reply
Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

WHITE AUSTRALIA PARTY INC.
First Plaintiff
THOMAS ANTHONY SEWELL
Second Plaintiff
and
COMMONWEALTH OF AUSTRALIA
First Defendant
ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Defendant

PLAINTIFFS' REPLY

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: REPLY

2. ***Question 1***: **No Affirmative Head of Power**: The Defendants' Submissions [DS] rely on two pleaded heads of power to support the validity of Part 5.3B of the *Criminal Code Act 1995* [Cth], the enumerated external affairs power at s 51(xxix), and the implied or incidental power of nationhood. The Intervenors support the s 51(xxix) case, but not the nationhood power case. As to the latter issue, Queensland supports the Plaintiffs' case. South Australia also disputes any basis for implication. In *Australian Communist Party v Commonwealth* [1951] 83 CLR 1 [*ACP Case*] this Honourable Court ruled against the nationhood power on facts and law in a decision accepted to be relevantly indistinguishable from the present case: at 188-192 per Dixon J, 212 per McTiernan J, 231 per Williams J, 259 ff per Fullagar J and 275 per Kitto J; cf 141-2 per Latham CJ.

3. As to the enumerated ground placitum (xxix) the challenged law's subject matter is voluntary associations or groups and their proscription which is a State not Commonwealth legislative power: Part 5.3B empowers the Executive to '*prohibit*' associations such as the First Plaintiff so as to deny it as stated in the legislation's objects a '*continued presence in Australia*' [ss 114A.1(2); 114A.4(1) and 114A.5(2)] to the end that the entity ceases '*to exist*' [s 114B.6(1)(a) (ii) and (2)(a)(ii)]. Victoria has legislated to form, govern and extinguish voluntary associations, and registered the First Plaintiff as an admittedly lawful association.

4. Relevantly, neither Defendants nor Intervenors take issue with the characterisation that Part 5.3B does not provide for any objective standard of liability relevant to the subject matter of the power, nor rule of conduct or corelative duty, nor for any legal or political rights or duties in anyone, nor any

such criminal offence created, which could objectively bring the impugned law within the external affairs power or any treaty made under it. It does not.

5. Accordingly, the only real connection to the claimed heads of power is the opinion of the Executive that authorises listing and resulting criminal sanctions. This arises at three levels. It begins with ASIO, whose report under s 114A.5 is required but need not be adopted [s 114A.5(2)]. Second, the Minister must be 'satisfied' that an organisation listed is of a certain character and specifying it protects the Australian community or part of it against any 'harm' broadly and vaguely described in the objects provision s 114A.1(1)(a).

6. Third, DS contends the Governor-General has power to make delegated legislation founded on opinion that it is '*necessary or convenient'* to Part 5.3B under s 5(1) of the Code on advice of the Council [*Constitution* s 62] a power described by Isaacs J in *Gibson v Mitchell* [1928] 41 CLR 275 at page 279 as words which '*signify what the Governor-General may consider necessary or convenient, and no Court can overrule that unless utterly beyond the bounds of reason and so outside the power*'. DS refer to *R v Toohey; Ex parte Northern Land Council* [1981] 151 CLR 170 as indicating constraints on the exercise of the power where there was bad faith. This matter concerns legislative power not administrative review.

7. Upon the authority of the *ACP Case* that opinion is insufficient. To these issues the voluminous evidence of the Defendants is irrelevant, as held by all the justices in the *ACP Case* [see questions 1 and 2], who also held the Commonwealth rightly did not answer the Plaintiffs' evidentiary case.

8. ICERD Article 4(b) is a treaty principally relied on, providing for a scheme of laws that proscribe organisations, analogous to the Roman law of *privilegium* as discussed by Fullagar J in the *ACP Case* [above, at page 261], whereas Part 5.3B does not. Further as made clear in the condemnation in the chapeau it is focussed on issues of '*colour and ethnic origin'* not to be conflated with nationalism or national origin. Incitive race discrimination referred to in Art. 4(b) may include the latter, but understandably does not include the former even on the disputed IHRA definition. A further objection to Part 5.3B concerns its extraneous reliance on 'harm' and social cohesion. DS gloss over other express inconsistencies between the Executive listing power and treaty obligations: eg against retroactivity [cf Art 15 ICCPR], or in aid of natural justice [cf Art 2, 5, 14.3, and 22 ICCPR; Art 5(a) and Art 6 ICERD]. Finally, Part 5.3B acknowledges no civil or political treaty rights in or for anyone.

9. In text and purpose, the disconformity is more radical than that found unacceptable by this Court in *R v Burgess; ex parte Henry* [1936] 55 CLR 608, which analysis was approved in *G Global 120E T2 Pty Ltd v Commissioner of State Revenue* [2025] 99 ALJR 1465 at [51]. For the above reasons the defence case of constitutional power is not made out.

10. **Freedom of Political Communication Impaired**: Contrary to the admissions in its defence at [28] and [31], the Commonwealth now says Part 5.3B does not "limit political communication to any extent", and "it is only in the making of a prohibited hate group regulation" where there could be some burden on the implied freedom: DS [31]. That is wrong. A law conferring a discretionary power which could lawfully be used to infringe the implied freedom burdens it. It is no defence to say that there is no burden because the discretion could be exercised sensibly (*Brown* (2017) 261 CLR 328 at [293]) or in respect of "groups with no discernible interest in communicating on government or political matters": DS [32]. Here the burden is severe. Once a burden is established, justification is for the party supporting the law: *McCloy* (2015) 257 CLR 178 at [24]; *Brown* at [131]; *Lees* [2025] NSWSC 1209 at [149], not the Plaintiffs.

11. Only Queensland and Victoria squarely raise the arguable defence, by saying that Pt 5.3B incorporates the implied freedom: because "reasonably necessary" in s 114A.4(1)(b) is "akin to the phrase 'reasonably appropriate and adapted'" (*Wotton* (2012) 246 CLR 1 at [32]), the statute "embed[s] a proportionality test" and any burden is justified "across the range of potential exercises of the power" (Qld [11]-[14]; Vic [37]). *Wotton* is distinguishable: the parole condition power in *Wotton* was an open-textured discretion over the *content* of the burden, and the inbuilt proportionality test was directed to the *kind* of condition that *could* be imposed.

12. Conversely, Pt 5.3B confers a binary discretion on the Minister to specify or to not. The actual burdens on the implied freedom are contained in the statute, *not* the regulation. Hence, in his statement of reasons, the Minister absurdly "concluded there is no less restrictive alternative that would achieve the level of protection from relevant harms achieved by removing [the First Plaintiff's] capability to operate as an organisation" (SC-18, SCB2 553). He identified no such alternatives, because Pt 5.3B offered nothing between removing the organisation and leaving it alone, and measured "the level of protection" by the removal itself. A Minister exploring alternatives the statute does not contain is not performing the proportionality analysis; he is showing the statute left no room for it. Accordingly, the third *Lange* limb must be directed to Pt 5.3B itself and that "reasonably necessary" in s 114A.4(1)(b) is not the leave pass the Defendants and Interveners think it is.

13. Directed to the statute, the third limb inquiry fails at necessity. Against eg Queensland's purpose of preventing hate crimes (Qld [22]), obvious and compelling alternatives existed (*McCloy* at [2]): (a) necessity to prevent hate crimes, not "psychological" harm from "continued presence"; (b) a trigger confined to organisations whose primary purpose or present activity is conduct within s 114A.3(5) (serious harm, death, serious property damage), rather than one past act (s 114A.4(2)), unconvicted (s 114A.4(4)), of speech, "assistance" or "praise" (s 114A.2(2)(c)) (s 114A.5(1) shows Parliament could draw a line at violence, but made it the Director-General's gateway, not the Minister's criterion); (c) deletion of s 114A.1(2); (d) a hearing, reasons and judicial determination.

Sections 114A.4(5) and 114A.5(5) exclude procedural fairness; the Director-General's advice is classified (SC [33]); reasons are not required. No one explains why any alternative would prevent one less hate crime.

14. The Plaintiffs maintain, further, that the purpose of Pt 5.3B is illegitimate (PS [67]-[72]). That answers Queensland's argument whether or not *Wotton* is distinguished. *Wotton* assumed a legitimate end, found in the statutory objects (at [31]-[32]). The purpose of Pt 5.3B is preventing hate crimes by empowering the Minister to list entities and criminalise association. In a democracy the Executive can never legitimately be empowered to criminalise association by reason of matters pertaining to race or ethnicity. Organisations are integral to political communication (*Ravbar* [2025] HCA 25 at [435]); race, ethnicity and national origin are intrinsically political subjects, being the stuff of debate on immigration, citizenship and Indigenous affairs (*Wotton* at [26]); and a power to proscribe organisations by reference to those subjects can inevitably be used to suppress political opposition.

15. **An Impermissible Exercise of Executive Power**: The Defendants' answer to Chapter III proceeds from a false characterisation of Pt 5.3B as merely creating prospective regulatory offences. The constitutional question is not whether prosecutions under Div 114B occur in a court. The question is whether the statutory scheme first vests in the Executive the power conclusively to determine that an identified organisation has engaged in criminal wrongdoing and then attaches punitive consequences to that determination. That is what Pt 5.3B does.

16. Question 3 is whether Part 5.3B of the ***Criminal Code Act 1995*** [Cth] is in whole or in part invalid because it is inconsistent with Chapter III of the Constitution. The Plaintiffs contend it is.

17. DS 58 to 61 focus on the wrong question. The question is that set out above, as agreed [SCB 104], not merely whether a non-judicial power is punitive. DS also focus on the wrong test: the issue is one of substance not form. In the first instance the power exercised impairs Chapter III because it is adjudicative [see s 114A(1)(b) and/or (2) and the words '*conduct constituting a hate crime*']. The word '*constituting*' in context means to '*form*' or '*to give legal force to*' [Macquarie Dictionary]. Adjudication of what constitutes criminal guilt in the Minister's mind is an exercise of judicial power. Section 114A.4(4) expressly dispenses with any requirement of conviction. The entire design of the Act is to destroy the capacity, by chilling measures, of selected groups to operate as lawful political or social associations..

18. Although the legislation describes the relevant circumstance element as the organisation being a "prohibited hate group", that status is entirely the product of Ministerial satisfaction under s 114A.4. Accordingly, the Executive's determination of alleged criminal conduct becomes a core element of every Div 114B offence. The vice is the Executive opinion which determines a key element for each s 114B offence. The court is required to accept the Executive-created status and determine only the remaining elements of the offence.

19. DS 61 then submits that in any event the listing power is reasonably capable of being seen as reasonably appropriate and adapted to a non-punitive purpose [cf ss 114A.4(1)(a),(2) and (3) and 114A4(4)]. It is not reasonable, for the purpose of achieving the objects in Part 5.3B, s 114A.1, to destroy political and other voluntary and arbitrarily punish members and supporters irrespective of involvement in any wrongful conduct on their part. A more appropriate course adapted to a non-punitive purpose is to provide by statute for community standards of democratic good order and liberty which the statute does not do.

20. Part 5.3B is in substance punitive for both the organisation that is expressly *'prohibited'* and thereafter extinguished by deliberative stultification, and its members, because due solely to Executive opinion '*the organisation is a prohibited hate group'*.

21. The Defendants' reliance upon *Duncan v NSW* is misplaced (DS [61]). In *Duncan*, the legislation imposed consequences by reference to predictive risk assessments concerning criminal organisations. Here the statutory criterion is materially different. The Executive is not merely assessing danger. It is determining whether wide-ranging criminal standards have been breached. That is the adjudicative function Chapter III reserves to courts. Further, the exclusion of natural justice by the Executive and retroactive application may also excite judicial power: see *Re Refugee Review Tribunal; ex parte Aala* [2000] 204 CLR 82 at [21] and [41-4]; *Plaintiff S 157 v Commonwealth* [2002] 211 CLR 476 at [73-5] and [102-3]. For these reasons the Defendants and Intervenors' submissions on this issue should be rejected.

Dated: 28 August 2026

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